IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.508 OF 2002

1. Suresh Jaikumar Samuel Godavari
at present lodged in Kolhapur
District Prison.

2. Satishkumar Anandam Pujari
at present lodged in Kolhapur
District Prison. ...Appellants.

V/s

State of Maharashtra ...Respondent.
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Mr. A.S. Rao advocate for the appellants.

Mr. A.M. Shringarpure, APP for the respondent - State.
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CORAM: V.M. KANADE, J.
DATE : 15TH OCTOBER, 2004

ORAL JUDGMENT:

1. Appellants are the original accused Nos. 1 & 2. They are challenging the judgment and order passed by the 2nd Ad-hoc Additional Sessions Judge, Kolhapur in Sessions Case No.102 of 2000. By the said judgment and Order dated 4/4/2002, the Trial Court convicted the appellant - original accused Nos. 1 and 2 for having committed an offence punishable under section 395 of the Indian Penal Code and sentenced them to suffer R.I. for 7 years and to pay fine of Rs 5000/- each and, in default of payment of fine, to suffer further R.I. for six months.

2. Brief facts are that dacoity took place in the house of Dr. Dhananjay Gunde on 11/1/2000 between 1.30 a.m. to 5.00 a.m. The names of the accused were not known and the FIR was lodged on the same day under section 395 and 397 of the Indian Penal Code and the statements of the witnesses were recorded. The accused were arrested on 27/7/2000. Prior to that, on 25/7/2000, an ambassador car in which the accused were travelling from Hyderabad to Omerga was detained and on 27/7/2000 they were arrested by the Latur and Kolhapur police. Between 2/8/2000 and 4/8/2000, recoveries were made at the instance of the accused from Chirala and Guntur District, Andhra Pradesh. On 26/9/2000, the jewellery recovered from the accused was identified by the prosecution witnesses. On 9/11/2000, identification parade was held in which the three eye witnesses i.e. Dr Gunde - P.W.8, Mrs. Lalita Gunde and their daughter Sucheta Lad - P.W.12 identified the accused.

3. Prosecution case is that on 11/01/2000 the appellants along with the absconding accused committed dacoity in the house of Dr. Dhananjay Gunde - P.W.8 between 1.30 a.m. to 5.00 a.m. They were armed with lethal weapons and took away golden ornaments and other valuable articles and also stole the Maruti Car

of the son-in-law of the complainant Dr. Gunde. According to the complainant, accused had entered the house by removing grills and opening the front door. P.W. 13 - Usha Jaiprakash was sleeping in the bed room on the ground floor along with her husband and, according to her, one accused held her arm and gave a blow on her head, as a result of which she fell down. Prosecution case is that, thereafter, three persons went upstairs to Dr. Gunde's room and one of them sat on his chest and threatened him with a knife. Another person pressed mouth of his wife with his hands. At that time, complainant's married daughter Sucheta - P.W.12 entered the room, after she heard the commotion and the third person pushed her inside the room. The accused, thereafter, demanded keys of the cupboard which were handed over by the wife of the complainant. The accused opened the cupboard, took out jewellery and money and ran away by taking Maruti Car belonging to Dr. Gunde's son-in-law. Thereafter, Dr Gunde and his family came out and raised hue and cry. His son-in-law who lived next door came there and, thereafter, called Shahapur Police Station. Police arrived soon thereafter and the panchanama of the scene of offence was made and the statements of witnesses were recorded and FIR was lodged. The Maruti Car which was stolen from the compound of the

complainant was found in front of the bungalow of one Baburao Mallappa Kannure - P.W.16 at Belgaum. Police seized the car under panchanama on 17/1/2000 which was claimed by son-in-law of the complainant Dr Salim Lad - P.W.9. An additional statement was given by the complainant to the Police on 18/1/2000 giving details of the other articles which were stolen on 11/1/2000. On 29/7/2000, API Mehboob Abdul Karim Mujawar - P.W. 14 was attached to LCB Latur, received an information that some criminals were coming in ambassador car from Andhra Pradesh by National High Way No.9. The rural police from Solapur also received the information that the said criminals were accused in Crime No.3 of 2000 which was registered at Kolhapur. Accordingly P.W. 14 and some other police officers intercepted and arrested the accused and the arrest panchanama was prepared and, thereafter, the custody of the accused was handed over to the rural police constable and they were sent to Kolhapur. The recovery was made at the instance of the accused of gold chain and other jewellery which was identified by the witnesses on 6/11/2000. The test identification was held and the accused were identified by the three witnesses. The Trial Court convicted the accused on the basis of the evidence adduced by the prosecution. Appellants have preferred this appeal challenging the said Judgment

and Order.

4. It is submitted by the learned Counsel appearing on behalf of the appellants that improvements were made by three eye witnesses in their statements regarding masks which were put by the accused on their faces. It is submitted that, according to the FIR and the statements of the witnesses which were recorded by the Police, it was stated that unknown persons were wearing monkey caps. However, in Court, improvement was made that the accused had removed the monkey caps while committing the said offence. It is submitted that, therefore, the entire prosecution case regarding identity of the accused has to be disbelieved on account of the said improvement. It is submitted that three witnesses have given three different versions regarding the said offence which was committed by the accused. The complainant - P.W.8 - Dr. Gunde had stated in the FIR that the accused were wearing monkey caps. However, in the examination-in-chief he has stated that he saw the faces of both the accused in the light emitted from the zero bulb which was there in his bed-room. P.W.13 - Usha Jaiprakash has stated that the accused had concealed their faces with Lungi and towel and that they had tied the witnesses and, thereafter, had switched on the light and opened the

cupboards and suitcases. It is submitted that, therefore, there was no occasion for the witnesses to have seen the faces of the accused. It is further submitted that the test identification parade also was not held properly and that P.W. 13 - Usha Jaiprakash has admitted in her cross-examination that the police had shown the accused to her before the test identification parade. It is further submitted that the test identification parade was vitiated as it was held in complete violation of the procedure laid down in the Criminal Manual. He further submitted that no change in the test identification parade was made when the witnesses identified the three accused. All the eye witnesses have stated that each accused was called turn by turn and was asked to stand alongwith six dummies during the identification parade. It is submitted that though there there were separate memorandums of each identification parade and in these memorandums the names of different individuals were mentioned, the Executive Magistrate and the panch witness Kamble had specifically deposed that no changes were made when the witnesses were called. It is further submitted that none of the witnesses had described any of the accused in their statement before the police. The only description of appellant no.2 was given as a person having fair complexion and later

on as white complexion by the other witness. It is submitted that the reason why the description could not be given was because the accused were not known to the witnesses and were wearing monkey caps. It is further submitted that the improvement made by the witnesses in their examination-in-chief that the monkey caps were removed by the accused after some time, made the prosecution case unreliable. It is submitted that the said improvement was a material improvement which created doubt about the varacity of the evidence given by these witnesses. It is further submitted that the delay in holding the test identification parade was not explained by the prosecution. He has submitted that the appellants were arrested on 29/7/2000 and the test identification parade was held on 19/10/2000. It is submitted that there was a gap of nearly 3 months from the date of the incident and the date on which the test identification parade was held. It is, thereafter, submitted that the recovery of the ornaments and jewellery at the instance of the accused was not in accordance with the provisions of section 27 of the Indian Evidence Act. It is submitted that the accused were knowing Telgu language. However, statements of the accused were recorded in Marathi. It is submitted that as per the provisions of section 27 of the

Evidence Act, the statement of the accused should be in the words of the accused. It is submitted that since the statements of the accused were written by Kalappa Patil, the said recovery under section 27 of the Evidence Act was not acceptable.

5. The learned APP appearing on behalf of the State submitted that the Trial Court had considered the evidence adduced by the prosecution and had given cogent reasons while coming to the conclusion that the accused had committed the said offence. He submitted that the revoery was made of the ornaments and articles at the instance of the accused from their house and also from other places where jewellery and ornaments were sold. It is submitted that these jewellery and articles which were recovered were identified by the complainant and other witnesses. It is submitted that the accused were identified by three eye witnesses in the test identification parade and they were also identified in Court. It is submitted that the complainant - P.W.8 had seen the accused in the light of the zero bulb in his bed room and the other two eye witnesses had stated that the accused had removed monkey caps for some time. It is submitted that thus the accused were seen by the eye witnesses on the date of the incident and later on

were identified by them in the identification parade and in the Court. It is submitted that there was enough evidence to prove that the accused had committed the said offence. It is further submitted that the Maruti Car which was stolen by the accused was found at Belgaum where it was abandoned by the accused. It is further submitted by the learned APP that the appeal was liable to be dismissed and the Judgment and Order of conviction passed by the Trial Court was liable to be confirmed.

6. Prosecution has examined in all 22 witnesses. Out of these 22 witnesses, Dr. Gunde - P.W. 8, Dr. Sucheta Lad - P.W.12 i.e. daughter of Dr. Gunde, and Smt. Usha Jaiprakash - P.W. 13 who was a guest of Dr. Gunde and had stayed in the said house on the said date of the incident, were examined as eye witnesses by the prosecution. Dr. Salimkhan Lad - P.W. 9 who was examined as witness had corroborated the prosecution case of dacoity in support of the prosecution case. Ramesh Inamdar - P.W.11 is the Executive Magistrate who held the test identification parade and Hindurao Kamble - P.W.16 is the panch who prepared the panchanama regarding the test identification parade.

7. The first question which needs to be considered is : whether the prosecution has proved that the accused had committed the said offence of dacoity? Dr. Gunde - P.W. 8 has stated in his evidence that on 10/1/2000, after completing his work, he came back to his house at about 8.30 p.m. Thereafter, they had their dinner at about 11.00 p.m. All of them had gone to their respective rooms and slept. He has stated that he and his wife were sleeping in their bed room on the first floor. In other bed room, his daughter Sucheta and his grand-daughter Roshani were sleeping and on the ground floor their guest Shri Jaiprakash and his wife were sleeping and his servant Ratnakar was sleeping in the hall. According to him, he woke up at 1.30 a.m. as somebody was sitting on his chest. According to him, he had seen that person in the light which was emitted from the zero bulb in his bed room. The said person asked him to keep quiet. He saw that one other person was standing near his wife and who had pressed her mouth with his hand. He then realised that thieves had entered his house. The person sitting on his chest demanded money from him. At that time, his daughter Sucheta came in their bed room. There was another person behind her and his wife and his daughter were talking among themselves in Kannada language. One of the thieves asked him to hand over

keys of the safe. Accordingly, his wife gave the keys to the said thief. Thereafter, one of the thieves asked his daughter and wife to remove the ornaments which were on their person. Accordingly, his daughter and wife removed their ornaments and handed over the same to them. The thieves then opened the cupboards and then left the place at about 5.00 a.m. in a Maruti Car of son-in-law of Dr. Gunde. This witness, thereafter, gave a list of ornaments which were stolen from his house and also identified the accused sitting in the Court. In the cross-examination, he has stated that there were in all 7 persons in the house. He has stated that out of 5/6 thieves he had seen 3 thieves on the said night and one of them was wearing hand-gloves. Sucheta Lad - P.W.12 has stated in her evidence as to what transpired on the night of 10/1/2000. She has, however, stated that thieves wore monkey caps and, after some time, they had removed these monkey caps. However, in the cross-examination she admitted that, the fact that the accused had removed monkey caps for some time, was not recorded in the police statement. This contradiction has been proved. Usha Jaiprakash - P.W.13 has stated in her examination-in-chief that the thieves had concealed their faces with the help of Lungi and towel which were in their room and that in her cross-examination

she has stated that there were six thieves. This witness has stated in her examination-in-chief that the thieves had concealed their faces with the help of lungi and towel which were in their room. From the evidence of these three eye witnesses, it can be seen that two eye witnesses have stated that the accused had covered their faces. Dr. Sucheta Lad - P.W.12 has stated that the accused had covered their faces with monkey caps whereas Usha Jaiprakash - P.W.13 has stated that they had covered their faces with lungi and towel which were in their room. P.W.12 has made an improvement in her statement by stating that thieves had removed monkey caps after some time. This improvement, however, has been brought on record and the Investigating Officer has admitted that the statement that the accused had removed monkey caps was not stated by the witness when her statement was recorded by the Police. Thus it is difficult to accept the prosecution case that the said eye witnesses had seen the accused at the time when the said dacoity was committed by them.

8. Over and above the discrepancy in the statement of the three eye witnesses regarding covering of the faces by the accused, there are other contradictions also in their statements. P.W. 8 - Dr. Gunde states

that there were 3 thieves. In cross-examination he has stated that there were 7 thieves. P.W. 13 - Usha Jaiprakash has stated in her cross-examination that there were 6 thieves. P.W. 12 - Dr. Sucheta states that she had seen 3 thieves. Thus, there is no consistency in the statements of these witnesses regarding the number of persons who had committed the robbery.

9. The accused were arrested on 27/7/2000 i.e. nearly after 7 months from the date of the said incident. No evidence has been brought on record as to how the Investigating Officer received an information that the persons who were travelling in the ambassador car from Andhra Pradesh to Omerga were the same persons who had committed the said offence. However, the fact remains that according to the prosecution, the accused were arrested and their ambassador car was seized. P.W. 14 - Mehaboob Abdulkarim Mujawar, API, Latur has stated in his evidence that in July 2000, he was attached to LCB Latur as Assistant P.I. and on 29/7/2000, he received an information that some criminals were coming from Andhra Pradesh by National High Way No.9. He has also received an information that the said criminals were travelling in their ambassador car bearing No. MEZ

3979. He has further stated that the rural police from Solapur also had received similar information. They had learnt that the criminals were accused in Crime No.3/2000 which was registered in Kolhapur District. He has stated that accordingly they all went near S.T. Stand, Omarga and found the ambassador bearing No.MEZ-3979 on the front side and bearing No.AP-27-E-497 written on the back side. After two persons in the ambassador car were apprehended, they disclosed their names as S. Jaikumar and Satishkumar Anandam Pujari. They did not have documents of the said car. The said persons were accordingly taken in custody. In the cross-examination, this witness has stated that there was no documentary evidence to show that the said persons were handed over to the Kolhapur Police. Similarly, no entry was taken in the record of their Police Station. He further admitted that there was no documentary evidence to show that the Kolhapur Police were also searching for the said persons. He admitted that he had not received information in writing about the Crime No.3/2000 from S.P., Kolhapur. The arrest of the two appellants, in the present case, is shrouded in mystery as no documentary evidence has been produced on record to show that after their arrest by the LCB, Latur any entry was made in the Latur Police Station or while

handing over custody to the Kolhapur Police any entry was made in their register at Latur. There is no explanation given by the prosecution regarding the basis on which these two persons were apprehended as being the same persons who had taken part in the robbery which had taken place at Kolhapur. Further, it is curious to note as to how LCB, Latur learnt that the alleged criminals who were travelling in the ambassador car which had come from Hyderabad were the same persons who had taken part in the robbery at Kolhapur because it is admitted by this witness i.e. P.W 14 that the Kolhapur Police had not sent any Fax message to the Latur Police Station regarding Crime No.3/2000. It is not the case of the prosecution that any contraband or ornaments in the robbery which was committed at Kolhapur were found in the ambassador car. The another circumstance which creates doubt regarding the arrest of the accused is that P.W.14 has stated in his evidence that the information was received by them that some criminals were travelling in an ambassador car bearing No.MEZ 3979. According to him, the car which was detained was bearing No.MEZ 3979 from the front side and AP-27-E-497 on the back side. It is not possible to accept the prosecution case that this car was travelling with two different number plates from Hyderabad and was not accosted till

they reached Omerga. This creates doubt whether the accused were, in fact, arrested on 30/7/2000 as alleged by these witnesses. There is every possibility that the accused were arrested earlier and a false report of their arrest appears to have been made showing their arrest on 30/7/2000. Further, so far as identification of the accused in the test identification period is concerned, three eye witnesses have stated that each accused was asked to stand along with 6 dummies during the identification parade and every time a new accused was brought. However, dummies were same and they were not changed. The memorandum regarding identification shows that names of different individuals are mentioned in each memorandum. However, P.W. 11 - Ramesh Inamdar has deposed that no changes were made when the witnesses Dr. Gunde and Mrs. Gunde were called. From the perusal of memorandum and panchanama of identification parade, it can be seen that it is silent on the physical characteristics of the dummies. No evidence has been adduced to show that the dummies were of similar physical appearance as each of the individual accused. In my view, the test identification parade has been held without following the procedure prescribed by the Bombay High Court Criminal Manual. There is nothing in the memorandum prepared by the

Special Executive Magistrate to show that either he questioned the accused that whether he was shown to the witnesses or that he questioned the witnesses whether they had seen the accused. Thus the basic precaution regarding identity of the accused has not been taken by the Special Executive Magistrate or by the Police. Apart from that, P.W.13 has admitted in her evidence that the police had shown the accused to her before conducting the identification parade. This clearly falsifies the prosecution case that the witnesses were identified in the identification parade. In my view, therefore, evidence of the test identification parade looses its evidentiary value and cannot be relied upon. The next circumstance is regarding recovery of gold ornaments at the instance of the accused. So far as the panchanama of recovery of the articles is concerned, certain recoveries were made from the house of the accused at Andhra Pradesh. However, since the recovery was from the place which was outside the jurisdiction of the Police Station, the panchanama ought to have been prepared at the place of recovery. The panchanama, however, appears to have been prepared at the spot where the articles were recovered. P.W. 3 - Shaikh who is a the panch examined to prove recovery panchanama has stated in his evidence that the gold bar was recovered from the

goldsmith and bangles were recovered from the accused - Pujari's house and the chain was recovered from the house of Suresh. In the cross-examination, he has stated that the police had not given receipt of the ornaments to the shop keeper and that the accused were handcuffed from the beginning to the end. He has also admitted that he was arrested by Police Inspector Sawant in one criminal case and he was in the custody of the Police. He has further admitted that P.I. Sawant had helped him in his bail application. Thus, it is difficult to rely on the testimony of this witness as he was under the direct control of P.I. Sawant and it cannot be said that he is an independent witness. In view of these discrepancies, it is difficult to believe the prosecution case that the appellants were the same persons who had committed the offence at Kolhapur. The eye witnesses have changed their story regarding removal of monkey caps by the accused. There was no reason to make any improvement on this crucial aspect of the case. Moreover, the incident had taken place at night. Even otherwise also, it is difficult to imagine that the eye witnesses who are in a position to see the accused were arrested almost after 7 months after the incident and the identification parade was held four months thereafter. Delay in holding the identification

parade has not been explained by the prosecution. The identification parade itself has not been properly held. P.W. 13 - Usha Jaiprakash has admitted in her cross-examination that the police had shown the accused to her before the identification parade. The panch who was examined had a criminal record and he was directly under the control of P.I Sawant. In view of this, it will have to be held that the prosecution has not proved beyond the reasonable doubt that the police have committed the said offence. The accused are, therefore, acquitted of the offence with which they are charged. The judgment and Order of the Trial Court is set aside. Accordingly the following order is passed:-

O R D E R

. Appeal is allowed.

. Appellants/Accused are acquitted of the charge which is levelled against them. Appellants/Accused to be released forthwith, unless they are otherwise wanted in any other case.

V.M. KANADE, J.